No. 567

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

RCA COMMUNICATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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I

THE COMMISSION CORRECTLY APPLIED THE LEGAL STANDARD OF PUBLIC INTEREST, CONVENIENCE OR NECESSITY

Respondent has wrenched from context a series of isolated statements in the Commission's comprehensive decision which convey an inaccurate picture of the decision as a whole. Thus respondent seeks to create the impression that the Commission found that the proposed authorizations to Mackay would be affirmatively harmful both to the public and to RCAC, and in spite of that finding granted the authorizations. In fact, the detailed analysis, in our opening brief (upon

which respondent has not commented) shows that the Commission considered each of the alleged evils of the authorizations and found each of them insubstantial, and that it affirmatively relied upon the benefits which may be expected to flow from competition (Govt. Br.[1] 17–24, 56–65). We believe that the difference between the Commission's findings and respondent's characterization of them is evident from even a casual comparison.[2]

Moreover, the standard of reasonable feasibility which the Commission articulated in its present decision does not, as respondent suggests (RCAC Br. 2, 40), reflect a policy of treating competition as an overriding consideration to be substituted for the usual standard of the public interest, convenience or necessity. On the contrary, the Commission has made it clear that the desirability of providing competition is but

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[1] References to the opening brief for the Federal Communications Commission appear herein as (Govt. Br. —). The brief filed by respondent is referred to as (RCAC Br. —).

[2] In particular, compare the statements (RCAC Br. 3, 46) that duplicate circuits "will have an impact (increase) on the rate structure" with R. 607; as to the "danger of foreign monopolies 'playing off' one United States carrier against the other" with R. 622–623; that the duplicate circuits "will degrade existing service" with R. 588–590; and that "additional scarce radio frequencies" will be required with R. 575–6, 585–7, 629. And compare the assertions (RCAC Br. 34–35) that the Commission found "that no benefits, rather harm, to the public will result" with R. 623–631, and that "competition between cable and radio would * * * be substantially reduced" with R. 615.

one of the considerations which goes into licensing (R. 27–9).

Respondent twice (RCAC Br. 17, 45) implies that Congress' failure to enact a bill designed to overturn the *Oslo* case manifested Congressional approval of that decision. Statements of the Senators on the committee considering the measure which clearly refute this contention are set forth in the appendix to this brief.

Respondent argues that the Commission has consistently applied the "public interest" standard in this field in the manner which respondent now advocates, and relies upon a series of prior Commission decisions to establish this proposition (RCAC Br. 41–5). The prior actions of the Commission in this respect are discussed in our opening brief (Govt. Br. 6–7, 44–9). In particular, we have discussed the holdings and language of the two previous Commission decisions denying duplicate radiotelegraph circuits to Oslo and Rome (2 F. C. C. 592 and 8 F. C. C. 11), which appear to be most at odds with the decision reached herein, and have shown that even these cases do not stand for the proposition that competition in direct radiotelegraph service is not, in appropriate circumstances, to be deemed in the public interest. In the other cases referred to by respondent (RCAC Br. 43–5) in which a license was denied, the decisions relied upon other factors in addition to the adequacy of

existing service.[3] *Mackay Radio & Telegraph Co.*, 12 F. C. C. 478, specifically demonstrates that the Commission has granted licenses which resulted in additional competition under conditions where such competition was found to be reasonably feasible.[4] The Commission's decisions reviewed in our main brief demonstrate plainly that the rationale of the decision in this case is not the novel doctrine or practice which respondent asserts.

The Federal Communications Commission's decision is in harmony with the decisions under the Interstate Commerce Act. Respondent relies

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[3] The *Press Wireless, Inc.* cases (6 F. C. C. 480, 11 F. C. C. 250, 12 F. C. C. 465, and Docket 7822) all involved a specialized press carrier, and the decisions turned in large part on considerations peculiar to the maintenance of a specialized press service. *Postal-Telegraph Cable Co.*, 9 F. C. C. 271, involved domestic telegraph service and occurred during wartime, when the Commission was expressly motivated by a desire to conserve strategic materials and skilled labor. *Mackay Radio & Telegraph Co.*, 6 F. C. C. 562, holds merely that a telegraph line between Washington and Baltimore could not be constructed without Commission authorization. The opinion rejects the contention that the *controlling* Congressional purpose in this field was to promote competition.

[4] In that proceeding, Mackay was already licensed to serve the point under consideration by means of a station in another part of the United States. Instead of permitting Mackay to undertake the expense of building a new station at New Orleans, the Commission authorized a carrier which already had a station there to provide service to Brazil even though it had not applied for such license. This had the twofold effect of preventing a large capital investment and of introducing additional radio competition to serve an area accounting for a substantial volume of traffic.

upon several decisions arising under the Interstate Commerce Act for the proposition that under that Act certificates of convenience and necessity are not granted when the facilities of existing carriers are adequate. We agree that the Interstate Commerce Act furnishes a background in the light of which the licensing provisions of the Communications Act must be interpreted, subject to the reservation that the Communications Act contains more specific indicia than does the Interstate Commerce Act that the preservation of competition was deemed important by Congress. See Govt. Brief, pp. 31–44.

It is true, of course, that many I. C. C. cases declare that a showing as to inadequacy of the existing service is a prerequisite to the issuance of a certificate. But this proposition is subject to two well-recognized limitations in situations comparable to that here presented.

I. The first qualification is that adequacy of existing service is not a barrier to the issuance of a certificate when the prior certified operator has a monopoly,[5] and there is enough business so that both the original and a competitive service can operate without loss. As early as 1924, the Commission recognized that existing monopoly conditions require different treatment from that

[5] In the pertinent cases cited by respondent (RCAC Br. 39–40) in which certificates were denied, a number of concerns were already in competition for the route, so that the denial did not permit a monopoly situation.

accorded existing services which are already competitive. Thus, in authorizing a railroad to enter into an area theretofore served exclusively by the Great Northern Railway, the Commission stated (*Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237, 256–257): "It is probable that the competition afforded would stimulate the Great Northern to further improve its service. Competition, within reason, rather than monopoly, is in the public interest." See also *Construction of Lines in Eastern Oregon*, 111 I. C. C. 3, 37 (1926). Accordingly, even though the existing service was deemed "adequate"; the Commission has frequently authorized another carrier to compete for the traffic served by a monopoly carrier. As is stated in *Mt. Hood Stages, Inc., Extension—Boise Salt Lake City*, 44 M. C. C. 535, 548 (cited by this Court with approval in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 532, n. 20):

> It does not necessarily follow, however, that because an existing carrier is supplying a good service, and, in quantum what appears to be a sufficient service, that there is no need for the establishment of a new operation. We cannot overlook the fact that between Salt Lake City and Boise, and, in practical effect, between those points and Portland, Stages enjoys a virtual monopoly of the bus traffic. In our views, it is not in the public interest that

> this important business should be reserved to a single carrier. Both the courts and the Commission have long recognized that reasonable competition is in the public interest. Regulated monopoly is not a complete substitute therefor. Competition fosters research and experimentation and induces refinements in service which might not otherwise be accomplished.

See also *Burlington Transportation Company, Common Carrier Application,* 33 M. C. C. 759, 767; *Santa Fe Trail Stages, Inc., Common Carrier Application,* 21 M. C. C. 725, 748–749; *Pan-American Bus Lines Operation,* 1 M. C. C. 190, 208–209. *Cf. Balch & Martin Motor Express, Common Carrier Application,* 47 M. C. C. 75, 78; *Tri-State Transit Company of Louisiana,* 29 M. C. C. 381, 391–393, 401–402.

The courts reviewing I. C. C. decisions have come to the same conclusion. See, in addition to the *Chesapeake & Ohio* case, discussed in our main Brief (pp. 32–4), *Lang Transportation Corp.* v. *United States,* 75 F. Supp. 915, 931, 933–934 (S. D. Cal.); *A., B. & C. Motor Transportation Co.* v. *United States,* 69 F. Supp. 166, 169 (D. Mass.). Respondent relies heavily (RCAC Br. 37–39) upon certain language in *Hudson Transit Lines, Inc.* v. *United States,* 82 F. Supp. 153 (S. D. N. Y.), affirmed, 338 U. S. 802. But there it clearly appeared that the existing and potential business was insufficient for either of two compet-

ing carriers to operate profitably,[6] and the district court accordingly held that the competitor could not be authorized to provide service along the same route.[7] But where, as here (see Govt. Br. 19–24), the coexistence of two competing services is "reasonably feasible," in the sense that there is enough business for both competitors, the Inter-

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[6] 82 F. Supp. at 157, bottom of first column.

[7] The affirmance of the judgment of the district court in the *Hudson Transit Lines* case by this Court does not imply approval of all of the language of the opinion upon which the respondent relies. In *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756 (E. D. Va.), affirmed by this Court the year after the affirmance in the *Hudson* case, 340 U. S. 802, the district court stated, in a factual context similar to that presented by the *Hudson Transit Lines* case (at 760–761):

"There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer & Storage Co.* v. *United States*, D. C., 42 F. Supp. 215, affirmed, 317 U. S. 587, 63 S. Ct. 31, 87 L. Ed. 481; *A., B. & C. Motor Transp. Co.* v. *U. S.*, D. C., 69 F. Supp. 166, 169. Section 207 (b) of the Interstate Commerce Act, 49 U. S. C. A. § 307 (b) states: 'No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways.'

"Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42, 51 S. Ct. 337, 75 L. Ed. 824; *North Coast Transp. Co.* v. *United States*, D. C., 54 F. Supp. 448, 451, affirmed 323 U. S. 668, 65 S. Ct. 62, 89 L. Ed. 543. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. *Lang Transp. Corp.* v. *United States*, D. C., 75 F. Supp. 915, 929; *Inland Motor Freight* v. *United States*, D. C., 36 F. Supp. 885."

state Commerce Commission authorities hold that the grant of authority to the second service is in the public interest without any finding that the existing service is inadequate.

Nor can respondent derive support for the proposition that its monopoly in direct radio circuits to Portugal and The Netherlands should not be treated as such because of the existing cable service.[8] For the Interstate Commerce Commission has long recognized that "competition from within the field of one's endeavor is one thing; that from without is quite another." *Santa Fe Trail Stages, Inc., Common Carrier Application, supra,* at 749. And it is consequently well established by the Interstate Commerce Commission decisions that the presence of one kind of competition does not preclude any grant of authority to a new carrier presenting a different form of transportation. *Bowles Common Carrier Application,* 1 M. C. C. 589, 591; *Maine-New Hampshire Stages Common Carrier Application,* 2 M. C. C. 297, 302; *Petroleum Transit Corp. Common Carrier Application,* 3 M. C. C. 607, 609.

2. If we assume that cable and radio are not to be regarded as different services, respondent is faced with the second qualification of the need for showing inadequacy of existing service. For many I. C. C. cases hold that a carrier presently certified and in competition with others can im-

[8] Or the Mackay indirect radio circuit through Lima, Peru to Portugal.

prove its service between the same two points by using an alternate route or otherwise without having to demonstrate the inadequacy of the services performed by the competing carriers. See in particular, *Clarke* v. *United States*, 101 F. Supp. 587 (D. D. C.) (Prettyman, J.), which reviews the cases; *C. E. Hall & Sons* v. *United States*, 88 F. Supp. 596 (D. Mass.) (Magruder, J.). For I. C. C. cases, see *Cooper's Express, Inc., Extension—Alternate Route*, 51 M. C. C. 411, 414; *Burlington Transportation Co., Extension—Illinois, Iowa and Missouri*, 43 M. C. C. 729, 731–732; *Dixie Ohio Express Co., Extension of Operations—Bristol*, 30 M. C. C. 291.

Thus, if we look merely to radio operations, Mackay's application was properly granted in order to compete with RCAC's monopoly, irrespective of the inadequacy of RCAC's facilities, so long as there was sufficient business for two operations. If we look to radio and cable combined, Mackay was entitled to direct radiotelegraph routes as an improvement over, or alternative for, its affiliated existing cable routes, again irrespective of the adequacy of the competing facilities, and so long as the additional operation was economically feasible (R. 576, 586–8, 596). Accordingly, it is clear that the decision of the Federal Communications Commission in this case is in accordance with the principles recognized and applied under the Interstate Commerce Act.

II

THE COMMISSION'S CONCLUSION THAT THE GRANTING OF THESE AUTHORIZATIONS WOULD NOT RESULT IN THE VIOLATION OF SECTION 314 WAS CORRECT

The majority of the court below did not pass upon the contention by respondent that the grants herein made will result in the violation by Mackay, or the AC&R system of which it is a part, of Section 314 of the Communications Act (R. 702). This question was not, therefore, raised in the petition for a writ of certiorari or discussed in our opening brief. Respondent, as is its right, now urges as a ground for affirmance of the judgment of reversal below that the authorizations in issue violate Section 314.[9] The following portion of this Reply Brief is addressed to this contention of respondent.

Section 314 (47 U. S. C. 314) provides in pertinent part that:

> * * * no person engaged directly, or indirectly through any person directly or indirectly controlling * * * such person, * * * in the business of transmitting and/or receiving for hire energy, communications, or signals by radio * * * shall * * * directly or indirectly, acquire, own, control, or

[9] Respondent also now relies upon Section 313, the general antitrust provision of the Act, although it made only the most casual reference to that section in the court below. We believe, however, that the arguments by respondent with reference to Section 313 are essentially repetitions of the arguments as to Section 314.

> operate any cable * * * line or system between any place in * * * the United States * * * and any place in any foreign country, * * * if * * * the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in * * * the United States * * * and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; * * *

A parallel provision deals with control of radio by a cable company.

Respondent's reliance upon this antitrust provision of the Communications Act is, to say the least, somewhat paradoxical. For respondent's position in this case is one of attempting to maintain an existing monopoly of direct radiotelegraph service between the United States and Portugal and the United States and The Netherlands.[10] We do not point out this paradox by way of suggesting that the contentions should be disregarded because they are advanced in support of an anticompetition position. But we think it clear that in evaluating the effects of the proposed operations by Mackay it is neces-

[10] During 1947 Mackay handled one-tenth of 1% of the telegraph traffic between the United States and The Netherlands (R. 612). However, during a short period in that year Mackay had a special temporary authorization to serve that country (R. 552-3). This authorization was terminated prior to the hearing (R. 553), and at the time of the hearing Mackay was not serving that country (R. 568-70).

sary to compare the pre-existing situation in which there were one direct radiotelegraph carrier [11] and two cable carriers serving the points involved with a situation in which there will be two direct radiotelegraph carriers and two cable carriers serving the points involved. Thus, if RCAC were to establish that competition is likely to be reduced, it must first overcome the natural inference that the addition of a new carrier means more rather than less competition.

The Commission, in the instant decision, specifically considered whether the grants made to Mackay would result in violation of Section 314 (R. 607–15; see Govt. Br. 22–4). The Commission's conclusion that no violation of this section would flow from these grants is grounded on basic findings with which respondent takes no issue. On the basis of a careful examination of the legislative history and purposes of Section 314, and of the entire factual context of the proposed operations, including analysis of the actual effects in the past of AC&R operations such as those here authorized, the Commission concluded that as a result of these grants competition between radio carriers would be substantially promoted, and competition between cable and radio would be preserved. It further concluded that these benefits would not be materially affected by the absence of competition within the AC&R system itself.

[11] In the case of Portugal there was indirect service via Lima by Mackay.

It is arguable that radio-cable competition in the international telegraph industry would be most effective if cable carriers and radio carriers were completely separate, with no affiliation which would dampen the competition between them. Such a situation has not existed in this field since the passage of the Communications Act. At the time Congress considered the enactment of the Communications Act both Mackay and Commercial, as well as other operating companies, were under the ownership and control of the International Telephone and Telegraph Corporation. Members of Congress, particularly those who served on committees which held hearings on bills affecting communications between 1927 and 1934, were fully aware of this common ownership and control of cable and radio companies. No question was raised by any of them concerning the legality of this arrangement, either under the provisions of Section 17 of the Radio Act of 1927 (from which Section 314 is taken), or the provisions of the bill which became the Communications Act (R. 611; see *Matter of the American Cable and Radio Corp., et al.*, F. C. C. Docket No. 9093, par. 101; Govt. Br. 41–2). Neither the section as enacted, nor its history,[12] suggests

[12] As respondent points out (RCAC Br. 53), the legislative history of Section 314 is exhaustively considered in *Matter of the American Cable and Radio Corp., et al., supra*, pars. 71–9, 101. As that decision has not yet been reported, we have filed copies of it with this Court. In the present case

that it was intended flatly to prohibit new cable-radio affiliation, or to decree a death sentence upon the then existing operation of both cable and radio by the predecessors of the AC&R system. As Judge Prettyman aptly put it (R. 705–6):[13]

> Section 314, it must be noted, does not prohibit all common ownership of radio and cable. It prohibits such ownership when certain conditions exist, that is, when the purpose or effect is substantially to lessen competition, to restrain commerce, or to create a monopoly. Certainly complete common ownership removes subsidiaries from competition with each other. If Section 314 be construed to prohibit a lessening of competition between sister companies regardless of other circumstances, the conditions specified in the section become meaningless and superfluous. So construed the section would flatly prohibit all common ownership of radio and cable operations, which it obviously does not do. *The section must have been aimed at some*

(R. 610) the Commission restated its conclusion therein that Section 314 was designed: "(a) to assure that radio, a relatively new medium of communication at the time these statutes were enacted should be permitted to develop fully and freely without interference from the older well entrenched cable medium; and (b) to assure that there would be competition between cable and radio as two separate and distinct means of international communication."

[13] As has been noted, the majority below did not reach the Section 314 issue.

> *condition or tendency other than those inherent in common ownership as such. It must have been aimed at a lessening of competition discernible in the circumstances of the specific situation, in addition to the bare fact of common ownership.* This idea is supported by the fact that, although it was known to the committees of Congress that Mackay and Commercial were under common ownership when the Communications Act of 1934 was under consideration, no unconditional prohibition of continued common ownership appears in that Act. [Italics added.]

Thus the question presented for decision here is whether the interrelationship of Mackay and Commercial and the impact of their actual operating arrangements may have the effect of substantially lessening competition, or restraining commerce, or tend to create monopoly.

In 1948, after the close of the hearing in the instant case, but before the rendition of any decision, the Commission undertook a complete investigation of the structure and operation of the AC&R system in order specifically to ascertain whether Section 314 was being violated thereby. In its decision in *Matter of the American Cable and Radio Corp., et al.*, F. C. C. Docket 9093, decided May 11, 1950 (hereinafter referred to as Docket 9093), the Commission concluded that Section 314 is applicable to the AC&R system, but that the ownership, control and operation of

cable and radio companies and facilities within the AC&R system did not constitute or result in a violation of Section 314 (R. 608–9; Docket 9093, par. 140). It was pointed out in that decision that in large part the investment in Mackay by its parent companies, as well as the grant of its original licenses by the Federal Radio Commission (the predecessor of petitioner) was motivated by a desire to *create* competition in international radiotelegraph services (Docket 9093, pars. 82, 84, p. 44; par. 109). Moreover, the Commission carefully examined the changes in operation of the AC&R system since Mackay's inception. It was determined that neither the growth of Mackay nor the operation of the AC&R system as a whole had produced the effects prohibited by Section 314.

This decision was reached after careful consideration of all of the consequences of common ownership and operation of cable and radio which are here asserted by respondent as constituting violations of the section (Docket 9093, pars. 54–56, 113–4, 117–33). Neither respondent, which participated fully, nor any of the other parties to that proceeding sought review of the Commission's decision. Accordingly, that decision established the lawfulness of the general system of operation of the AC&R companies, including the common control by AC&R of cable and radio subsidiaries.

Although we recognize (see RCAC Br. 22) that the determination in Docket 9093 is not a determination that all future cable-radio acquisitions or new activities by the AC&R group are lawful (R. 609; see Docket 9093, par. 139), the validity of the basic relationship of Mackay and Commercial therein determined goes far toward establishing the legality of the authorizations in the case at bar.[14] Docket 9093 reveals that there are a few small companies in the international telegraph field with specialized interests which require the rendition of service to a specific country or group of countries. To most areas of the world, however, radio service is rendered only by carriers which render or attempt to render a general world-wide radiotelegraph service. Indeed, there was evidence in the present record that such facilities are necessary for a second carrier for it to be competitive with RCAC (R. 46, 276). In the European area there are only two carriers providing a general competitive radiotelegraph

[14] In its exceptions before the Commission in the instant case respondent contended only that "the instant proceedings involve 'applications to communicate with three new points' while the 'proceedings in Docket No. 9093 do not involve new circuits, but relate to the appropriate action in respect of the existing consolidated cable-radio operations of AC&R in general and Mackay, Commercial and All America in particular'" (R. 609). Respondent put in issue in the appeal from the instant decision only the effects of the particular authorizations made here (see Notice of Appeal, R. 655–61). It does not here challenge the Findings in Docket 9093 (cf. RCAC Br. 21–2).

service. One is respondent; the other is Mackay (Docket 9093, par. 29). In Docket 9093 the Commission determined that it was lawful and appropriate for Mackay to be authorized to render general service, including service to points also served by Commercial, despite its affiliations with that cable company. The instant authorizations enable Mackay to render more complete service; they do not change the general pattern of AC&R operations or in any other way provide for departure from the overall system approved in Docket 9093.

In arguing that the authorizations to Mackay will result in a substantial lessening of competition, respondent largely restricts itself to consideration of the shift in traffic from one AC&R subsidiary (Commercial) to another (Mackay) (RCAC Br. 23–30, 55–58). It urges, in effect, that if competition between any radio company and any cable company is lessened to any appreciable extent the statute is violated, and that the shift of AC&R traffic constitutes such a lessening. The Commission properly determined that in order to ascertain whether a substantial lessening of competition between radio and cable would result from the grant of the applications in issue, it was necessary to examine the entire factual situation concerning radio and cable communication to the countries involved, and the probable competitive effects of the grants gen-

erally (R. 611). *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527–8.

The Commission's factual analysis is, in the main, set forth in our opening brief (pp. 7–17). The share of traffic handled by each of the carriers serving the points in issue in 1947 was as follows (R. 612):

Country	RCAC	Western Union	AC&R Companies		
			Cable Co.	Mackay	Combined
	Outbound				
Portugal	51.4%	36.3%	6.5%	5.8%	12.3%
Netherlands	29.8%	47.5%	22.7%	0.1%	22.8%
	Inbound				
Portugal	80.7%	13.9%	2.5%	2.9%	5.4%
Netherlands	52.8%	29.8%	17.3%	0.1%	17.4%
	Total				
Portugal	63.5%	27.0%	4.9%	4.6%	9.5%
Netherlands	40.5%	39.2%	20.2%	0.1%	20.3%

This tabulation demonstrates that RCAC and Western Union were the major carriers serving these points, each handling a substantially larger proportion of the total traffic than the AC&R system. The authorizations at issue will enable the AC&R system to compete more effectively against these carriers. It is also significant that for the entire European area, of which these countries are a part, the AC&R system handled

in 1947 a smaller share of the traffic—both outbound and inbound—than either RCAC or Western Union (Docket 9093, par. 122, Table IIA).

The record shows that as a result of the grant of Mackay's applications some of the traffic which would ordinarily be handled by Commercial outbound from the United States will be diverted to Mackay by the management of these companies (R. 577, 591, 613–614). This diversion will amount to approximately 50% of Commercial's outbound traffic to The Netherlands and 25% of Commercial's outbound traffic to Portugal (*ibid.*).

These figures give some indication of the extent to which Commercial will continue as an active carrier of traffic between the United States and the countries involved. In view of Commercial's present inbound cable traffic and the larger proportion of the toll retained by AC&R on cable than radio traffic, there is ample economic incentive for Commercial vigorously to seek traffic despite the arrangement between AC&R and the foreign administrations by which Mackay will receive inbound traffic in proportion to the amount sent outbound by radio.

Respondent's contention that competition may be substantially lessened would be erroneous even if cable-radio competition were the only factor to be considered. In the first place, although respondent treats the Mackay-Commercial relationship as presenting a merger problem (RCAC Br.

61), such is not the case. These companies are not now merging. They have been operated as a coordinated system for a number of years.[15] The instant authorizations allow the introduction of direct radio service by an enterprise (AC&R) which has in the past operated only cables or indirect radio service to the points involved. When the present authorizations were issued, Mackay had no circuit to The Netherlands, and only the indirect route to Portugal by connection with All-America Cables and Radio, Inc., at Lima, Peru, over which AC&R traffic to Portugal was handled (R. 583). Thus there was no prior competition between Mackay and Commercial for

[15] When Mackay first applied for licenses from the Federal Radio Commission in 1928, it proposed a coordinated system of cable and radio service which clearly evisaged the handling of traffic by one medium or the other on a flexible basis (Docket 9093, pars. 81–2). The Commission found (R. 566): "Mackay, All America and Commercal have been operated as a coordinated system since 1940 through the common parent company, AC&R. During the last few years there has been an increasing effort toward the consolidation of the operations of the three companies. Separate corporate entities are maintained, serving certain functions such as in obtaining foreign concessions and in maintaining pension plans. AC&R now regards itself as an integrated cable and radio system and insofar as possible operates as an integrated cable and radio system and from a management standpoint is concerned with the system as a whole rather than with the individual companies comprising the system. * * * It is clear from the facts of record that at the time of the hearing herein there was no appreciable competition among these three companies for international telegraph traffic, or in rendering international telegraph service."

traffic to The Netherlands, and the diversion of traffic from one to the other did not mean that competition between them was being lessened. And although the indirectness of the route through Lima to Portugal made it unlikely to attract customers on its own merits on any large scale (R. 626), the substitution of a more direct circuit, with its greater customer appeal, cannot be said to *decrease competition,* especially since Mackay will continue, as it has in the past, to handle all unrouted AC&R traffic to Portugal (R. 583, 591).

Moreover, whatever the effects of the instant grants on operations within the AC&R system, it is clear that even as far as cable-radio competition is concerned these grants will tend to increase such competition in the industry as a whole. True, Commercial will handle less traffic *to* the points involved, and in that restricted sense, perhaps, competition between it and RCAC may be lessened, although competitive vigor cannot be gauged by volume of traffic where there is diversion to an affiliate. But any lessening of competition by Commercial will be outweighed by the introduction of Mackay as a competitor into The Netherlands picture, and the strengthening of its service to Portugal. The consequence of this strengthening of Mackay, hitherto an unimportant competitor for traffic to those countries, will mean an increase in competition

between radio (Mackay) and cable (Western Union) (Govt. Br. 10–11, 23–4, 61–2). There was good reason for the Commission's belief that this enhancement of competition outweighed any possible lessening of competition between affiliates.

The Commission's findings in Docket 9093, which are based on virtually the same record as the instant proceeding, and which are decisive as to the AC&R operation as of the time that record was made since respondent did not appeal from that decision, demonstrate the validity of this analysis. Traffic statistics for the European area, of which these countries are a part, for the period between 1938 and 1947 show that during that period Mackay became the normal route for AC&R traffic (including unrouted traffic placed with Commercial) for twenty-nine countries. And yet, at least as far as competition can be judged by the amount of traffic handled, the competitive situation as between cable and radio became more balanced (1938: cable 82.3%—radio 17.7% outbound from the United States; 1947: cable 55.9%—radio 44.1% outbound from the United States), and competition between Mackay and Western Union increased.[16] Similar findings

[16] The situation is set out in paragraph 122 of Docket 9093 as follows: "*Summary of Traffic Statistics. European Area.* The record shows that between 1938 and 1947, Mackay opened circuits to more countries in this area than it opened to countries in either of the other world areas; and that the circuits so opened included circuits to most of the major countries in this area, i. e., England, France, Germany, and

were made with respect to the South American area, the only other area to which substantial

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the U. S. S. R. In addition, it appears that in this area, Mackay, since 1938, has become the normal route for [Commercial] traffic to twenty-nine countries * * * thus, in effect, eliminating whatever pre-existing competition there had been between it and [Commercial] with respect to these countries. However, * * * there is strong competition between radio and cable carriers for traffic to this area; and * * * despite the opening of new circuits by Mackay and the above-described routing practices, RCAC was able to achieve a greater percentage point gain than did Mackay, in its share of the total traffic exchanged with this area. A review of the data also indicates that for 1947 the cable companies handled more traffic outbound to the area than did the radio companies; and that Western Union, a cable company, handled a larger share of the outbound traffic than any other carrier, accounting for 41.1% of the total traffic outbound to the area. It is likewise clear that in 1947 there was a more balanced competitive situation as between cable and radio than obtained in 1938. Thus, in 1938, the situation with respect to competition between cable and radio was as follows: RCAC handled 15.4% of the traffic outbound to the area while its cable competitors, [Commercial] and Western Union, handled a total of 76.8% of such traffic; Mackay handled 1.3% and its cable competitor, Western Union, handled 49.7%; all radio companies handled 17.7%, while all cable companies handled 82.3%. In 1947, on the other hand, RCAC handled 30.3% of such traffic while Western Union and [Commercial] handled 55.9%; Mackay handled 11.0%, while Western Union handled 41.1%; all radio companies handled 44.1% while all cable companies handled 55.9% of the total outbound traffic to the area. It is obvious that between 1938 and 1947 Mackay became an effective competitor of RCAC and Western Union. It also appears that although some lessening of competition between RCAC and [Commercial] may have resulted from respondent's routing practices, these same routing practices have had the result of increasing competition between a radio company and a cable company, namely, Mackay and Western Union."

amounts of traffic are handled both by cable and radio. (Docket 9093, par. 23).

Respondent makes much of the predicted shift in traffic inbound to the United States from itself to Mackay. Examination of the factors which control the allocation of inbound traffic, however, make it clear that the shift will not result from or reflect a lessening of competition. In the first place, each foreign administration here involved controls all radio traffic inbound to the United States from its country (R. 569, 583). They follow a policy of giving inbound traffic to those carriers which are in a position to give outbound traffic to them. Accordingly, RCAC has heretofore received all the inbound direct radiotelegraph traffic from the points at issue, because it has been the only radiotelegraph carrier providing direct service to them (R. 606).

The present authorizations to Mackay mean that two American carriers instead of one will be in a position to receive such inbound traffic. The allocation of inbound traffic between RCAC and the AC&R system will be based upon the traffic which they respectively handle outbound, and in that sense will be determined artificially rather than competitively. But the division of traffic is a matter controlled by the foreign administrations, and it replaces a monopoly of direct inbound traffic by RCAC. It cannot be said to reduce radio competition. It is, to say the least,

ironic to characterize as heinous the substitution of a noncompetitive allocation of inbound radio traffic for a noncompetitive monopoly of inbound radio traffic. It is even more ironic to describe the system under which Mackay will get a proportionate share of the inbound traffic which RCAC presently monopolizes as involving the "purchase" of traffic, "a predatory practice long forbidden to carriers" (RCAC Br. 62).

With respect to cable-radio competition for inbound traffic, the situation is unchanged by the instant authorizations to Mackay. Foreign administrations control radio traffic only (R. 569, 583), and the cable carriers and their correspondents will presumably continue to solicit inbound cable business in The Netherlands and Portugal to the same extent that they have in the past (R. 256). For cable-radio competition for inbound traffic will continue to be between the cable carriers (Western Union and Commercial) or their correspondents on the one hand and the foreign administrations on the other.

We believe that it has been demonstrated that no substantial lessening of competition will result from the authorizations herein, even if respondent's analysis restricting the inquiry to competition between cable and radio were accepted. However, it is submitted that such a limited approach is improper in the context of the statute here under consideration. The overall competitive situation must be the determining

factor in deciding whether a substantial lessening of competition, which is the effect prohibited by Section 314, will result. The conclusion of Judge Prettyman on this point is pertinent (R. 707):

> Section 314 embodies a portion of anti-trust policy, specifically provided by the immediately preceding Section 313. The Commission was entitled to look at the whole picture in formulating its judgment as to the public interest. Thus viewed this grant of a radio circuit to Mackay certainly tends to serve the purposes of the statute. RCAC now enjoys a monopoly in radio between the places here involved. Mackay, by this grant, would introduce competition, would reduce restraint on commerce, and would destroy instead of create monopoly. The Commission thought these broader considerations pertinent and important. I think so too.

The Commission in this case found that (R. 606–7):

> * * * a grant of Mackay's applications herein, while resulting in some decrease in cable competition, will increase over-all competition for telegraph traffic generally, and will introduce more effective competition between radiotelegraph carriers serving the points involved.

The correctness of this conclusion has been demonstrated in our original brief (pp. 8, 10–11,

21, 23–4, 61, n. 52). The record shows that these grants will result in the shift of some traffic outbound from the United States from RCAC and Western Union to Mackay in the case of The Netherlands (R. 579–80, 614) and from RCAC to Mackay in the case of Portugal (R. 594, 614). It can hardly be contended that the shift of traffic outbound from the United States from RCAC to Mackay would be the result of lessened cable versus radio competition. It would result primarily because of heightened competition provided by the addition of a new radio carrier. To the extent that traffic would shift from Western Union to Mackay this would clearly be the result of increased competition between that cable carrier and Mackay, a radio carrier.

We submit that in all the circumstances, the Commission's decision that the effect of the grants to Mackay would be beneficial to competition was plainly correct. The Commission was confronted with a choice here either of continuing RCAC's monopoly of direct radiotelegraph service to The Netherlands and Portugal or of authorizing Mackay to provide a competitive service. It seems clear that no other existing carrier would, as a practical matter, attempt to render service to the countries involved. At least no such carrier had applied to do so. Likewise, it would have been foolhardy to anticipate, in the foreseeable future, the formation of a new carrier to

enter the field now occupied only by RCAC and Mackay.

Respondent seeks to avoid the force of the Commission's analysis of the competitive situation by arguing in effect that the Commission should not have undertaken a factual analysis. Respondent argues that, as a matter of law, there is a "substantial" lessening of competition between cable and radio within the meaning of Section 314, merely because Commercial will lose considerable business to Mackay. It relies upon *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, and *International Salt Co.* v. *United States*, 332 U. S. 392, for the proposition that the anticipated reduction in Commercial's cable traffic as a result of the shift to Mackay is substantial (RCAC Br. 55–7). These cases involved exclusive dealing arrangements in which possible competitors were shut out of the market. Here there is only the diversion of traffic from one to another affiliate of a single enterprise in order to permit it to compete more effectively with other equally large systems. Here there is no exclusion of anyone, apart from respondent's attempt to exclude Mackay from operating a competing radio circuit by opposing its application for a license.

While we do not concede that the potential traffic shift within the AC&R system is in any way comparable in importance to the transactions involved in the *Standard Oil of Calif.* and

International Salt cases,[17] it is clear, as has been pointed out above, that the Mackay-Commercial traffic shift is not the only consequence, competition-wise, which will flow from the challenged authorizations. There will now be radio-cable competition to the points involved for the first time between Mackay and Western Union, while Commercial and Western Union will continue to compete with RCAC. The Commission's conclusion, based upon all probable effects of the new Mackay operations, that there will not be a substantial diminution of radio-cable competition (R. 615) cannot be refuted by a quantitative consideration of the magnitude of one effect only. We believe, moreover, that the analysis of the factual situation, *supra*, demonstrates that if this conclusion errs, it errs on the side of conservatism. In all probability there will be a substantial *increase* in cable-radio competition.

The cases cited by respondent to show that the interrelationship of Mackay and Commercial

[17] The situation in the *Standard Oil of Calif.* case, *supra*, has recently been characterized as follows by the author of the Court's opinion therein: "In the *Standard Oil* case, we dealt with the largest seller of gasoline in its market; Standard had entered into exclusive supply contracts with 16% of the retail outlets in the area purchasing over $57,000,000 worth of gasoline." *Federal Trade Commission* v. *Motion Picture Ad. Serv. Co.*, 344 U. S. 392, 401–2 (dissenting op.). *International Salt* involved annual salt sales of some $500,000 by the largest producer of industrial salt and the tying of sales of nonpatented products to patented products, thus improperly enlarging the scope of the lawful monopoly afforded by patents.

unlawfully restrains commerce differ markedly in their facts and contexts from the case at bar. Quite unlike the instant case (*supra*, pp. 20, 25-30), these cases involve the abuse of dominant or monopoly power.[18] Here the regulatory agency charged with the responsibility of licensing carriers in the public interest and by the terms of Section 602 (d) of the Communications Act (47 U. S. C. 602 (d)) with enforcing compliance with provisions of the antitrust laws, has found in a comprehensive investigation (Docket 9093) that the integrated relationship of Mackay and Commercial is not violative of Section 314. Common

[18] *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (sole newspaper in community); *Timken Co.* v. *United States*, 341 U. S. 593 (involved by far the largest producer of tapered roller bearings in the United States, England and France); *United States* v. *Griffith*, 334 U. S. 100 (sole theater in each of a number of communities); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (abuse of copyright monopoly by block booking); *International Salt Co.* v. *United States*, 332 U. S. 392; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (each involved abuse of patent monopoly); *United States* v. *General Motors Corp.*, 121 F. 2d 376 (C. A. 7), certiorari denied, 314 U. S. 618 (respondent used dominant power in the industry and monopoly of its customers' trade to coerce its customers); *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439 (allegations that all railroads operating in an area conspired to fix rates to discriminate against that area held to state cause of action under the Sherman Act).

ownership does not insulate corporations which violate the antitrust laws from the consequences of such conduct.[19] But where there is a lawful ownership affiliation between two companies which do not possess monopoly power, economic conduct consistent with that affiliation does not make the relationship unlawful. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 523. The fact that AC&R will shift traffic from one of its wholly owned subsidiaries to another is not necessarily unlawful where the relationship itself is lawful. In Docket 9093, the Commission found that such traffic shifts were neither unlawful, unreasonable, nor unduly harmful to the other carriers (pars. 131–2, 139–40).

Respondent argues that the contracts by which Mackay will receive inbound traffic from The Netherlands and Portugal companies in proportion to the amount of outbound radio traffic carried by Mackay from the United States will give Mackay and its affiliates an incentive to divert cable traffic from Commercial to Mackay and that such a plan will constitute an unlawful tying arrangement in violation of the antitrust laws, and of Section 313 of the Communications Act.

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[19] *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U. S. 211 (conspiracy to boycott a customer who refused to adhere to resale price fixing scheme). And see *United States* v. *Yellow Cab Co.*, 332 U. S. 218; *United States* v. *General Motors Corp.*, 121 F. 2d 376 (C. A. 7), certiorari denied, 314 U. S. 618.

But as the Government stated in its argument in *Times-Picayune Publishing Co.* v. *United States*, Nos. 374–375, not yet decided, tying clauses are unlawful when based upon monopoly power or a dominant position which results in market control or gives the tying agreements a coercive effect. Plainly, the AC&R companies, which in 1947 (the last year covered by the present record) handled 9.5% of the traffic to and from Portugal and 20.3% of the traffic to and from The Netherlands (see p. 20, *supra*), much less than either of the other two competitors, cannot be said to dominate the field of telegraphic communications between the United States and those countries, or to exercise any control of that market. And this would still be the fact if all of Commercial's traffic were diverted to Mackay. If and when it appears that there is a reasonable possibility or probability of the AC&R system securing such a dominant position as substantially to threaten a lessening of competition, the Commission,[20] or the courts under the antitrust

[20] Licenses must be renewed at least every five years (Section 307 (d), 47 U. S. C. 307 (d)) and may be rejected for failure to observe any of the conditions of the Act (Section 312, 47 U. S. C. 312). At the present time licenses in this field are issued for two-year periods (§ 6.29, Rules & Regulations of the F. C. C.). The Commission is also empowered to revoke licenses or to issue cease and desist orders for violations of the Communications Act, including, of course, Sections 313 and 314. Section 312, 47 U. S. C. 312.

laws, have ample power to deal with the situation.

Respondent has not seriously challenged the Commission's conclusion that the authorizations in issue would not tend to create a monopoly in international telegraph in the AC&R system (R. 614–15). The Commission not only found that the ability of respondent and other carriers to furnish service generally and to the points involved would not be endangered (R. 607; Govt. Br. 14–5, 21), but the record also showed that even with these grants the combined AC&R companies will be handling less total traffic between the United States and both The Netherlands and Portugal than either RCAC or Western Union (R. 612–14).

We submit that the Commission, as the agency entrusted with the duty of administering the Communications Act in the public interest, must exercise considerable discretion in evaluating the complex factors which lead to the determination whether particular practices may substantially lessen competition, unreasonably restrain trade, or create a monopoly. *Federal Trade Commission* v. *Motion Picture Adv. Co.*, 344 U. S. 392. The instant decision was a reasonable exercise of such discretion.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of

appeals should be reversed, and the decision of the Commission affirmed.

Respectfully submitted.

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APRIL 1953.

APPENDIX

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE COMMERCE, UNITED STATES SENATE, SEVENTY-FIFTH CONGRESS, 3D SESSION, ON S. 3875

(pp. 85–86):

Senator WHITE. I really do not like the suggestion that failure of Congress to act in the remainder of this session of Congress indicates an acquiescence by the Congress in anything, because, quite apart from what our views may be and quite apart from what we might be willing to do if we had the time to do it, we do face the naked fact that there are only a few days more of the life of this Congress. I do not really agree with the suggestion that if we fail to act it is to be taken as an approval or disapproval of what has been going on. I do not think it should have significance one way or the other.

Mr. KERN. Legally, I think the failure to act within a few [days] would not be so construed. The failure to act after the matter has been presented to Congress and there have been opportunities for hearings and nothing done does have the effect of acquiescence.

Senator WHITE. Well, if the life of the Congress were to run on for 2 or 3 or 4 months I think there would be great force in what you say, but if the life of Congress is measured by a few days more——

Mr. KERN (interposing). But our problem, Senator, is more than a question of that. We may not be able to continue in existence if we cannot continue the contracts which we have already made and

cannot make new contracts. Our situation may be such that the failure to act at this time, which may be only a month's delay or 3 weeks' delay now, will mean a year's delay, and a year's delay will be fatal in the competition of future radiotelegraph communications between the United States and Europe. That is the reason for the urgency, more than the question of failure to act within the 2 or 3 weeks that Congress may have.

Senator WHITE. All that may be true, but I think the chairman will agree with me on this: I do not think that either the Communications Commission or anyone else would be warranted in drawing the conclusion that we acquiesced in or approved what has taken place simply because, in possibly the 2 weeks that is left of the session of this Congress, legislation will not pass dealing with such an important subject. If the chairman does not coincide with those views of mine he can give his own.

Senator MINTON. I agree with you.

Senator WHITE. Even if we were completely persuaded as to the soundness of your contention, if we were convinced that the action of the Commission had been contrary to public policy and had been in disregard of the congressional intent, still the question arises as to whether, in the remaining hours or days of this session of Congress, we could do anything about it. I would not want the fact that there is a possibility that nothing shall be done about it in this remaining short time to be accepted by anyone as an indication of indifference to the problem before Congress

or as approval of what had taken place. That is all I wanted to emphasize.

Mr. WOZENCRAFT. May I express the hope and view with respect to what the Senator has said, if he has not intended to do so, that he will also make clear the fact that anything he may have said in this hearing does not mean that he does disapprove of what the Communications Commission has done and that his mind is still open and that he has reached no judicial conclusion on the questions before him?

Senator WHITE. I am not on the witness stand.

Mr. WOZENCRAFT. I am expressing that hope because I know how your statement will be used before the Federal Communications Commission.

Senator WHITE. You will have to leave to me what statements I want to make and when I want to be silent.

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